

Federal Communications Commission

FCC 95-79

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 Before the
 Federal Communications Commission
 Washington, D.C. 20554

DISPATCHED BY

MM Docket No. 95-31

In the Matter of

Reexamination of the Comparative
 Standards for New Noncommercial
 Educational Applicants

NOTICE OF PROPOSED RULEMAKING

Adopted: February 28, 1995;

Released: March 17, 1995

Comment Date: April 24, 1995

Reply Date: May 10, 1995

By the Commission:

I. INTRODUCTION

1. In this *Notice*, we invite additional comments relating to possible modification of the criteria currently used to select among competing applicants for new noncommercial educational ("NCE") broadcast facilities.¹ Comments received in GC Docket No. 92-52 concerning NCE comparative criteria will be consolidated with comments received in this proceeding and modification of the NCE comparative criteria will be considered in the context of this proceeding, not in the context of GC Docket No. 92-52. We are sensitive to the need to resolve the questions addressed in this proceeding as quickly as possible. We have therefore established a short comment and reply comment period and will act expeditiously once the pleading cycle is completed.

II. BACKGROUND

2. The standard comparative issue designated in NCE proceedings currently inquires into "the extent to which each of the proposed operations will be integrated into the overall cultural and educational objectives of the respective applicants." *New York University*, 10 RR 2d 215, 217-8 (1967). The Commission also asks whether "other factors"

in the record demonstrate that one applicant will provide a superior noncommercial educational broadcast service. See *New York University*, *supra*; see also *Carnegie-Mellon Student Government Corporation*, 7 FCC Rcd 3814, 3915-6 (1992). Between 1970 and approximately 1988, NCE *Hearing Designation Orders* contained an additional criterion: the manner in which the proposed operation of the respective applicants meets the needs of the community to be served. See *Pacifica Foundation*, 21 FCC 2d 216, 221 (Rev. Bd. 1970); *Seattle Public Schools*, 103 FCC 2d 862 (1986). See also *Black Television Workshop of Santa Rosa, Inc.*, 65 RR 2d 34 (Rev. Bd. 1984); and *Southeastern Bible College*, 85 FCC 2d 936, 937 (Rev. Bd. 1981).²

3. In 1992, we initiated a general proceeding to reform the criteria used to select among mutually exclusive applicants for new broadcast facilities. *Notice of Proposed Rulemaking In the Matter of Reexamination of the Policy Statement on Comparative Broadcast Hearings*, GC Docket No. 92-52, 7 FCC Rcd 2664 (1992) ("NPRM"). See also *Second Further Notice of Proposed Rulemaking*, 9 FCC Rcd 2821 (1994) ("NPRM2") (soliciting additional comments in light of the appellate decision in *Bechtel v. FCC*, 10 F.3d 874 (D.C. Cir. 1993)). In the NPRM, we made the following statement with respect to the criteria used in NCE comparative proceedings:

Under current practice, applicants for noncommercial stations are not compared using the same criteria as those used for commercial applicants. Instead, noncommercial applicants are evaluated as to the extent to which each of the proposed operations will be "integrated into the overall operations and objectives" of the respective applicants. *New York University*, 10 RR 2d 215, 217-8 ¶¶ 8-9 (1967). Upon reflection, it appears that use of such a vague standard may make rational choices among noncommercial applicants difficult, if not impossible. We note, for example, that the Review Board, for this very reason, recently urged the Commission to reexamine the comparative analysis to be applied in these cases. *Real Life Educational Foundation of Baton Rouge, Inc.*, 6 FCC Rcd 2577, 2580 n.8 (Rev. Bd. 1991) (subsequent history omitted).

NPRM, 7 FCC Rcd at 2669.

4. We therefore tentatively concluded that the "vague standard" currently used in NCE comparative proceedings "should be eliminated" and that we should consider using a modified version of the "point system" proposed in the NPRM for commercial applicants. We invited comments on these proposals and on: (i) whether the criteria used to select commercial applicants were relevant in NCE pro-

¹ As a general matter, we do not consider in this proceeding the standards applicable to resolving mutually exclusive applications filed against renewal applicants. Those standards are the subject of a separate proceeding. See *Formulation of Rules and Policies Relating to Broadcast Renewal Applicants*, 4 FCC Rcd 6363 (1989), 4 FCC Rcd 4780 (1989); 3 FCC Rcd 5179 (1988). In those cases, however, in which a renewal applicant is not accorded an expectancy and is not disqualified, that applicant would be compared to any competing applicant using the "new" comparative criteria adopted in this proceeding.

² The "community needs" criterion has been omitted from recent NCE *Hearing Designation Orders*. See *Real Educational*

Foundation of Baton Rouge, Inc., 3 FCC Rcd 4359 (M. M. Bur. 1988); *Maricopa Community College District*, 3 FCC Rcd 5637 (M.M. Bur. 1988) and *Cabrini College*, 4 FCC Rcd 5462 (M.M. Bur. 1989). See also *Carnegie-Mellon*, *supra*. The Review Board recently opined that this unexplained omission must be "in belated obedience to the Commission's 1984 [Public Broadcasting] *Deregulation Order*" [Program Policies and Reporting Requirements Related to Public Broadcasting Licensees, 98 2d 746 (1984)], which eliminated the formal ascertainment procedures for NCE-FM stations. *Real Life Educational Foundation of Baton Rouge, Inc.*, 6 FCC Rcd 2577, 2578 (Rev. Bd. 1991).

ceedings; (ii) whether different or additional criteria should be used; and (iii) whether a different comparative approach should be followed for state-owned public broadcasters as opposed to other NCE applicants. *Id.*

5. In response, we received six sets of comments from interested parties on June 2, 1992: (i) joint comments from The Association of America's Public Television Stations and National Public Radio ("APTS/NPR");³ (ii) the National Federation of Community Broadcasters ("NFCB");⁴ (iii) joint comments from a group of NCE Broadcasters ("NCE Licensees");⁵ (iv) Valley Public Television, Inc. ("Valley"); (v) the Georgia Public Telecommunications Commission ("GPTC");⁶ and (vi) Harry M. Plotkin. APTS/NPR also filed reply comments on June 30, 1992, responding specifically to the submission of NFCB. Finally, APTS/NPR filed brief joint comments in response to NPRM2 on July 22, 1994.⁷

III. DISCUSSION

6. We have examined the comments submitted and we conclude that the record is not sufficient to fully decide this issue. We are concerned that the comments received may not be representative of the full range of actual and potential NCE station operators. By separating this proceeding from our ongoing proceeding on comparative criteria for commercial stations and requesting comments specifically addressing the NCE comparative criteria, we hope to give all interested parties a greater opportunity to comment so that the record will be more complete.

7. Most of the existing comments agree on one major point: that the current NCE comparative criteria are inadequate. They also agree on several less critical points, including that: (1) the traditional commercial comparative criteria are inappropriate for NCE applicants; (2) "time-sharing" should be eliminated from consideration in NCE comparative proceedings; (3) auxiliary power should be eliminated as a comparative criterion; and (4) a comparative coverage factor should be applied in some manner. APTS/NPR and NFCB were the only commenters who described detailed alternatives to the existing criteria for selecting from among competing NCE applicants. Their proposals were widely divergent.

8. APTS/NPR urges retaining and "refining" the existing NCE comparative criteria and sets forth three proposed "clarifying guidelines" to facilitate the Commission's evaluation of competing NCE applicants. First, APTS/NPR states that the Commission should examine which applicant will best integrate the station operations with its educational and cultural objectives. In making this evaluation, the Commission should consider, *inter alia*, whether the applicant: (1) has clear, definable educational and cultural objectives; (2) has objectives directed outwardly to the com-

munity of license, not exclusively to the licensee; and (3) describes adequately its anticipated program format and plan for program promotion and submits adequate evidence that it can implement its service. Second, the Commission should determine which applicant's proposed operations will "best meet community needs." Here, according to APTS/NPR, the Commission should consider, *inter alia*, whether the applicant: (1) has a reasonable process in place to determine educational and cultural needs; (2) has proposed services and objectives that will meet identified community needs; and (3) has a governing board composition that is broadly representative of the community to be served or, in the case of state/local government licensees, is accountable to the public. Finally, proffers APTS/NPR, the Commission should look to whether "any other factors demonstrate that one applicant will provide superior broadcast service." Such factors would include, *inter alia*, whether an applicant's proposal: (1) would permit operating efficiencies by virtue of "common ownership" of NCE facilities; (2) would demonstrate a workable ability to bring service to unserved or underserved areas; and (3) will use available technology fully. APTS/NPR comments, at 18.

9. NFCB, on the other hand, urges the adoption of an all-or-nothing "point system" which relies on criteria that, for the most part, are not now considered in the NCE context. The factors NFCB suggests are: diversification (3 points); minority control (3 points); spectrum efficiency (a coverage comparison) (3 points); local program origination (2 points); local residence of principals (2 points); and finder's preference (only as a "tiebreaker") (1 point).

10. NFCB did not file reply comments on the APTS/NPR proposal. However, APTS/NPR states in its reply comments that NFCB's proposal is too narrowly focused and will favor only one subset of public broadcaster -- the small community radio station -- "without a corresponding increase in the likelihood that these stations will better serve the Commission's objectives [for NCE service]." APTS/NPR reply comments, at 11. The disparity in viewpoints leads us to believe that we should seek further comments from other interested parties on the proposals made by APTS/NPR and NFCB and on related issues, as well as the submission of alternative proposals.

IV. QUESTIONS FOR COMMENT

11. Accordingly, we now seek additional comments on the following issues:

1. Generally, whether the existing NCE criteria should be retained and, if so, whether the "refinements" to the criteria proposed by APTS/NPR are

³ APTS represents most of the nation's public television stations. NPR represents approximately 500 full service public radio stations.

⁴ At the time comments were filed, NFCB had a membership of 62 participating community broadcasters and 115 affiliates.

⁵ The NCE Licensees are: Arizona Board of Regents for Benefit of the University of Arizona, Board of Supervisors of Louisiana State University and Agricultural and Mechanical College, Central Michigan University, Columbia College, Iowa Public Broadcasting Board, Kent State University, KVIE, Inc., Nevada Public Radio Corp., the Ohio State University, State of Wisconsin-Educational Communications Board, and WAMC.

⁶ GPTC's "comments" consisted of the submission of the "Brief and Exceptions" filed with the Review Board in a comparative proceeding for a new commercial channel in Roswell, New Mexico, MM Docket No. 89-337. The submission does not specifically address the NCE comparative criteria.

⁷ Jimmy Swaggart Ministries, Inc. ("JSM") later filed comments in response to the Commission's Order, FCC 94-072, Mimeo No. 42769 (released September 2, 1992), issued subsequent to a voluntary remand of the appeal of the grant of JSM's application for a new NCE FM station. Those comments have been consolidated into the record here.

appropriate? Specifically, are certain of the the APTS/NPR proposals, including, for example, the proposals to favor applicants with objectives that are "directed outwardly to the ... listening community, and not exclusively to the licensee itself," to favor applicants with a governing board that "is broadly representative of the community to be served," and to favor applicants who can demonstrate operating efficiencies through "common ownership," likely to unfairly disadvantage certain types of applicants and why?

2. Should the factors enumerated in (1) above and/or other factors APTS/NPR proposed be eliminated or modified? Should the factors proposed by APTS/NPR be weighted in the manner suggested? If factors in addition to those proposed by APTS/NPR should be considered, what are they and how should they be weighted?

3. Should a "point system" be adopted in place of the existing NCE comparative criteria, as proposed by NFCB? If so, are NFCB's proposed comparative factors both appropriate and comprehensive, and are the weights suggested by NFCB appropriate? If not, what factors should be considered and how much weight should be given to each factor. Additionally, what factor(s) should be employed as a "tiebreaker," and how should those factors be applied?

4. What would be the impact of both the APTS/NPR and NFCB proposals on the universe of potential applicants, *i.e.*, do either or both proposals accommodate the wide variety of applicants currently eligible to apply for NCE stations?

5. Would some system other than the two proposed in comments currently before us better serve the Commission's goals in selecting among noncommercial educational applicants, and if so, how should that system be structured?

6. Should the mandatory "share-time" arrangement consideration be retained as a means of resolving NCE mutually exclusive groups?

7. Should a different comparative approach be followed for state-owned public broadcasters as opposed to other NCE applicants and, if so, how should this separate comparative approach be structured?

8. Should the Commission impose a "holding period" for NCE stations granted as a result of comparative hearing to insure the continued viability of the criteria used in the selection process, as stressed in *Bechtel v. FCC*, *supra*, or should some other mechanism be employed for that purpose?

12. *Additional Considerations.* We have previously indicated that the current NCE comparative standards are vague and difficult to apply. *NPRM*, *supra*, 7 FCC Rcd at 2669. Because we are here instituting a rulemaking to develop new standards for choosing among mutually exclusive applicants, we believe it inappropriate to continue to designate mutually exclusive NCE applications for hearing under the existing comparative criteria. Similarly, we believe it is inappropriate to continue to adjudicate under the existing comparative criteria pending hearing proceedings involving mutually exclusive proposals for new noncommercial broadcast facilities. Therefore, we are as of the release date of this *Notice* imposing a partial freeze on

the processing of NCE-FM applications. In light of this freeze, we will, as noted in paragraph 1, *supra*, make every effort to resolve the questions addressed herein as quickly as possible.

13. We will continue to accept NCE applications and to process those NCE applications which are not mutually exclusive, and we will continue to rule on and approve appropriate universal settlements among mutually exclusive NCE applicants. Until we have adopted new or revised NCE-FM comparative criteria in this proceeding, however, we will not designate mutually exclusive NCE applications for comparative hearing. Further, as of the release date of this *Notice*, the Administrative Law Judges, the Review Board, and the Commission will no longer issue decisions in pending hearing proceedings involving competing applicants for NCE broadcast facilities where those decisions would rely upon the existing comparative criteria for NCE applicants. To avoid unnecessary delay, however, the Administrative Law Judges, the Review Board, and the Commission will continue to facilitate, consider, and approve, where appropriate, settlements among NCE applicants now involved in hearing proceedings provided such settlements are consistent with current Commission policies governing those agreements.

14. In light of our decision here to hold relevant pending hearing proceedings in abeyance until such time as we adopt new or revised comparative criteria, we solicit comments as to how we should apply any newly adopted criteria to these cases. For example, should we permit applicants in these cases to file one-time as-of-right amendments for purposes of taking into account the new or revised criteria?

V. PROCEDURAL MATTERS

A. Ex Parte Rules -- Non-restricted Proceeding

15. This is a non-restricted notice and comment Rulemaking proceeding. *Ex parte* presentations are permitted, provided they are disclosed as provided in the Commission's Rules.

B. Regulatory Flexibility Act

16. An Initial Regulatory Flexibility Analysis is contained in the Appendix to this *Notice*.

C. Authority

17. Authority for the Rulemaking action is contained in 47 U.S.C. §§154(i), 154(j), 303(r), 309(g), 309(i), 403.

VI. ORDERING CLAUSES

18. ACCORDINGLY, IT IS ORDERED, that NOTICE is hereby given of the proposed regulatory changes describe above, and that COMMENT IS SOUGHT on the issues listed above.

19. IT IS FURTHER ORDERED, That pursuant to applicable procedures set forth in Sections 1.415 and 1.419 of the Commission's Rules, comments SHALL BE FILED on or before April 24, 1995, and Reply comments shall be filed on or before May 10, 1995. To file formally in this proceeding, commenters must file an original and four copies of all comments, reply comments, and supporting comments. If commenters want each Commissioner to receive a personal copy of their comments, they must file an

original plus nine copies. Comments and reply comments should be sent to the Office of the Secretary, Federal Communications Commission, Washington, D.C. 20554. In addition, commenters should file a copy of any such pleadings with the Chief, Mass Media Bureau, Room 314, 1919 M Street, N.W., Washington, D.C. 20554. Commenters should also file one copy of any documents filed in this docket with the Commission's duplicating contractor, International Transcription Service, 2100 M Street, N.W., Washington, D.C. 20036. Comments and reply comments will be available for public inspection during regular business hours in the FCC Reference Center (Room 239), 1919 M Street, N.W., Washington, D.C. 20554.

20. For further information, contact Michael F. Wagner, (202) 418-2720, Mass Media Bureau.

Any Significant Alternative Minimizing Impact on Small Entities and Consistent with the Stated Objectives

None

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

APPENDIX

INITIAL REGULATORY FLEXIBILITY ACT ANALYSIS

Reason for Action

The Commission has previously determined that the criteria used to select from among competing applicants for new noncommercial educational applicants were vague and difficult to apply.

Objectives

The Commission seeks to adopt more meaningful criteria and to adopt a simplified hearing process to select new noncommercial educational broadcast licensees on an expedited basis.

Legal Basis

Action is being taken pursuant to 47 U.S.C. §§154(i) and (j), 303(r), 309(g) and (i), and 403.

Reporting, Record-Keeping, and Other Compliance Requirements

This proposal would reduce such requirements by eliminating and simplifying litigation involved in prosecuting a mutually exclusive application for a new noncommercial educational broadcast facility.

Federal Rules which Overlap, Duplicate or Conflict with the Proposed Rules

None

Description, Potential Impact, and Number of Small Entities Affected

This proposal would benefit all small noncommercial educational entities seeking a new noncommercial educational broadcast facility by reducing and simplifying the administrative burdens associated with the comparative hearing process.